

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEVEN J. ARMSTRONG,
Plaintiff,
v.
MICHAEL J. ASTRUE, Commissioner
of Social Security,
Defendant.

) CASE NO. C12-0556-RAJ-MAT
)
)
)
)
) REPORT AND RECOMMENDATION
)
) RE: SOCIAL SECURITY DISABILITY
)
) APPEAL
)
)
)

Plaintiff Steven J. Armstrong proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Supplemental Security Income (SSI) benefits after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be REVERSED and REMANDED for further proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1965.¹ He has a GED and “minimal earnings” from

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

01 employment throughout his life. (AR 24, 44-48.)

02 Plaintiff filed an application for SSI benefits on August 30, 2007, alleging disability
03 beginning August 1, 2007. Plaintiff's application was denied at the initial level and on
04 reconsideration, and he timely requested a hearing.

05 A hearing was scheduled for May 14, 2009. Plaintiff, unrepresented, called to report
06 that he was unable to make the hearing due to an extended dental appointment. (AR 82). Upon
07 receiving medical corroboration from plaintiff's oral surgeon (AR 308-09), the ALJ
08 re-scheduled the hearing to July 28, 2009 (AR 126-32). At hearing, the ALJ took testimony
09 from plaintiff and a vocational expert. (AR 34-86.) On October 5, 2009, the ALJ issued a
10 decision finding plaintiff not disabled. (AR 22-33.)

11 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review
12 on July 20, 2011 (AR 3-7), making the ALJ's decision the final decision of the Commissioner.
13 Plaintiff , now represented, appealed this final decision of the Commissioner to this Court.

14 **JURISDICTION**

15 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

16 **DISCUSSION**

17 The Commissioner follows a five-step sequential evaluation process for determining
18 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it
19 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had
20 not engaged in substantial gainful activity since the application date and, in fact, had "minimal
21 earnings" throughout his life. At step two, it must be determined whether a claimant suffers

22 Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 from a severe impairment. The ALJ found plaintiff's personality disorder, mood disorder, and
 02 polysubstance dependence severe. Step three asks whether a claimant's impairments meet or
 03 equal a listed impairment. The ALJ found that, including the substance use disorders,
 04 plaintiff's impairments met the criteria of Listings 12.04 (Affective Disorders) and 12.09
 05 (Substance Addiction Disorders) of the Listing of Impairments, 20 C.F.R. Pt. 404, Subpt. P,
 06 App. 1, §§ 12.04. 12.09.

07 However, an individual is not considered to be disabled if drug addiction or alcoholism
 08 (DAA) would be a contributing factor material to a determination of disability. 42 U.S.C. §§
 09 423(d)(2)(C), 1382c(a)(3)(J). Therefore, the ALJ proceeded to conduct an analysis as to
 10 whether plaintiff's substance use disorder is a contributing factor material to the determination
 11 of disability (the "DAA" analysis). The ALJ found that any limitations remaining after
 12 plaintiff stopped the substance use would not cause more than a minimal impact on his ability to
 13 perform basic work activities and, therefore, found plaintiff not disabled.

14 This Court's review of the ALJ's decision is limited to whether the decision is in
 15 accordance with the law and the findings supported by substantial evidence in the record as a
 16 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
 17 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
 18 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
 19 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
 20 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
 21 F.3d 947, 954 (9th Cir. 2002).

22 Plaintiff argues the ALJ violated agency procedures and rules by conducting the July

01 28, 2009 hearing without discussing the issue of attorney representation. Plaintiff further
 02 argues the ALJ erred in failing to adequately develop the record with regard to periods of
 03 sobriety, and erred in concluding that plaintiff's medically determinable impairments would not
 04 be severe in the absence of substance abuse. He requests remand for further administrative
 05 proceedings. The Commissioner argues that the ALJ's decision is free of legal error,
 06 supported by substantial evidence, and should be affirmed.

07 Attorney Representation

08 As noted previously, plaintiff's administrative hearing was originally scheduled for
 09 May 14, 2009. (AR 114-21.) The record reflects plaintiff called the ALJ's clerk the day
 10 before the hearing, indicating he might be late for the hearing due to a dental appointment. The
 11 clerk suggested plaintiff should change the dental appointment. (AR 82.)

12 The next morning (the date of the hearing), plaintiff called from his dentist's office to
 13 indicate he would not be able to arrive in time for the hearing. The clerk instructed plaintiff to
 14 get a letter from his dentist and submit it to the ALJ. (AR 82-83.) The ALJ proceeded to
 15 examine the vocational expert in the absence of plaintiff. (AR 83-87.)² Immediately
 16 following the hearing, a Notice to Show Cause for Failure to Appear was issued by the ALJ,
 17 indicating (incorrectly) that plaintiff had "failed to provide an explanation" for not appearing at
 18 the hearing, and directing plaintiff to submit a written statement with the reasons for not
 19 appearing. (AR 124.) Plaintiff submitted a letter from his oral surgeon, dated May 14, 2009,
 20 verifying plaintiff was unable to appear for court due to extraction of "his remaining upper teeth

22 _____
 22 2 The testimony was apparently not relied on, as a different vocational expert testified at the
 second hearing. (AR 34.)

01 and place[ment of] a full upper and lower partial denture." (AR 308-09.) The ALJ "considered
 02 that a good reason" (AR 37), and rescheduled the hearing to July 28, 2009 (AR 126-33).

03 Plaintiff appeared at the rescheduled hearing without an attorney. After calling the
 04 case and administering the oath to plaintiff and the vocational expert, the ALJ made the
 05 following statement:

06 Mr. Armstrong, you didn't show up for your last hearing but you sent in
 07 a reason why. You were having some dental work done and the appointment
 08 went longer than you thought. And I gave—I considered that a good reason
 09 and rescheduled your hearing.

10 Now you're not represented by a lawyer. Normally I offer
 11 unrepresented claimants an opportunity to get a lawyer by postponing the
 12 hearing one time but we already had another hearing in your case and I can't
 13 offer you that postponement for that reason. You've had a lot of time here to
 14 get an attorney or seek legal counsel and I simply can't sacrifice another hearing
 15 slot so we're going to have to go forward today on your hearing.

16 (AR 37.) The ALJ proceeded to examine plaintiff and the vocational expert.

17 Plaintiff cites the Hearings, Appeals and Litigation Law Manual (HALLEX), an
 18 internal agency manual, in support of his argument that the ALJ's failure to engage in any
 19 colloquy with plaintiff in order to give him an opportunity to request a postponement of the
 20 hearing, as well as the ALJ's failure to consider the factors specified in the HALLEX in
 21 determining whether to grant a postponement, constituted harmful error requiring remand for
 22 another hearing. Plaintiff argues the ALJ's apparent "one postponement per claimant" policy
 denies due process by violating the requirement that the individual circumstances of an
 unrepresented claimant be specifically considered.

23 The Commissioner argues a continuance of the hearing to allow a claimant to obtain
 24 representation is within the discretion of the ALJ, after considering the claimant's "reason for

01 requesting the change, the facts supporting it, and the impact of the proposed change on the
 02 efficient administration of the hearing process...include[ing but not limited to] the effect on the
 03 processing of other scheduled hearings, delays which might occur in rescheduling [the] hearing,
 04 and whether any prior changes were granted....” 20 C.F.R. § 416.1436(f). The Commissioner
 05 notes plaintiff had been advised of his right to representation in the initial claim denial (AR
 06 92-93), in the denial upon reconsideration (AR 96), in the hearing notices (AR 109, 115,
 07 119-20), and in the notice of the rescheduled hearing (AR 127, 131-32), and that plaintiff knew
 08 how to contact the hearing office to request a continuance, since he had done so at the time of
 09 the first hearing.

10 The Commissioner’s argument, however, misses the mark. At the commencement of
 11 the second hearing, the ALJ preemptively announced no request for a postponement would be
 12 entertained. The record does not show the ALJ engaged in any discussion with plaintiff about
 13 the necessity of a postponement or any efforts he may have undertaken to secure representation.
 14 Rather, as plaintiff suggests, the ALJ appears to have adopted a “one postponement per
 15 claimant” rule, indicating plaintiff could not be granted another continuance since he had
 16 already been given one, despite finding that the previous postponement was for “a good
 17 reason.” (AR 37.)

18 While the HALLEX does not impose “judicially enforceable duties[,]” *Lowry v.*
 19 *Barnhart*, 329 F.3d 1019, 1023 (9th Cir. 2003), it reflects the programmatic policy of the
 20 Commissioner and interprets agency regulations. HALLEX I-1-001. Furthermore, the
 21 Social Security Act is a remedial statute, to be broadly construed and liberally applied in favor
 22 of beneficiaries. *LaMadrid v. Hegstrom*, 830 F.2d 1524, 1531 (9th Cir. 1987). The Court is

01 not satisfied the procedures utilized by the ALJ in declining to postpone the hearing provided
02 the due process anticipated by agency policies and regulations. Therefore, the matter should
03 be remanded to reschedule another administrative hearing at which plaintiff has the opportunity
04 to be represented by counsel.

Other Issues

06 The remand of this matter for hearing renders moot plaintiff's argument that the ALJ's
07 drug abuse and alcoholism (DAA) finding lacked substantial evidence. However, the Court
08 finds it appropriate to address plaintiff's contention the ALJ failed to adequately develop the
09 record with regard to this issue.

The ALJ in a social security case has an independent “duty to fully and fairly develop the record and to assure that the claimant’s interests are considered.”” *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (citing *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996) (quoting *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983))). This duty extends to the represented, as well as to the unrepresented claimant. *Id.* When the claimant is unrepresented, however, the ALJ must be especially diligent in exploring for all the relevant facts. *Cox v. Califano*, 587 F.2d 988, 991 (9th Cir. 1978). This duty may be heightened when the claimant is mentally ill, and is triggered where the evidence is ambiguous or the ALJ finds the record inadequate to allow for proper evaluation of the evidence. *Tonapetyan*, 242 F.3d at 1150.

The DAA materiality analysis requires the ALJ to consider whether a claimant's disabling limitations remain if he is not using alcohol or drugs. 20 C.F.R. §§ 404.1535, 416.935. The "key factor" in this determination is whether an individual would still be found

01 disabled if he or she stopped using drugs or alcohol. *Id.* at §§ 404.1535(b)(1), 416.935(b)(1).
02 In that regard, it may be particularly important to establish whether a claimant is consuming
03 these substances during the time period in which his limitations are present.

4 In this case, plaintiff testified he had been clean and sober since his release from prison
5 in 2007, with two brief exceptions. (AR 56-57.) He testified the conditions of community
6 supervision after he was released from prison required him to submit to drug and alcohol
7 testing, and he did not fail any of the tests. (AR 56.) He also testified that Sound Mental
8 Health conducts blood testing as part of his mental health treatment. (AR 64-65.)

These records, if entered into evidence, would either substantiate or rebut plaintiff's assertions about his sobriety since his release from prison. Without attempting to obtain the records, the ALJ instead found plaintiff's "reported remission from drugs and alcohol cannot be substantiated. ... Unless the claimant's sobriety can be objectively measured and confirmed, I do not believe the claimant." (AR 31.) On remand, the ALJ should supplement the record by requesting drug testing records created after plaintiff's release from prison in 2007, and consider those records as part of the DAA analysis.

CONCLUSION

17 For the reasons set forth above, this matter should be REMANDED for further
18 administrative proceedings.

19 DATED this 6th day of February, 2013.



Mary Alice Theiler
United States Magistrate Judge